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WM. R. STANSBURY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 53

GULF, COLORADO & SANTA FE RAILWAY COMPANY,
Petitioner,
vs.
MRS. OLIVIA MOORE, ADMINISTRATRIX, *Respondent.*

On Certiorari to the Court of Civil Appeals of Texas, Third Supreme Judicial District.

BRIEF FOR PETITIONER

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vs.
MRS. OLENA MOSER, ADMINISTRATRIX, *Respondent.*

On Certiorari to the Court of Civil Appeals of Texas, Third Supreme Judicial District.

BRIEF FOR PETITIONER

The opinion of the Court of Civil Appeals of Texas in this case is reported in 277 Southwestern Reporter, 722; and appears in printed record at p. 127; and the judgment of the Supreme Court of Texas dismissing application for writ of error for want of jurisdiction appears in foot note, 277 Southwestern Reporter 722, and p. 142 printed record.

GROUNDS OF JURISDICTION

Judgment to be reviewed was rendered October 21, 1925 (R. 132).

This action was founded upon the Employer's Liability Act of Congress of April 22, 1908 (Chap. 149, 35 Stat. at L. 65), amended by Act of April 5, 1910

(Chap. 143, 36 Stat. at L. 291), same being Chapter E of the United States Compiled Statutes 1918, Sections 8657 to 8665, specially upon Section 8657 of said Compiled Statutes; action being by Mrs. Moser as administratrix to recover damages because of the death of her husband, who was alleged to have been employed as a brakeman by petitioner and at the time of his death through negligence of defendant, was engaged in the performance of his duties in interstate commerce. (R. 1-6.)

Petitioner claims that by the erroneous rulings of the State Courts, particularly of the Court of Civil Appeals, it has been denied titles, rights, privileges and immunities claimed under said Federal Act in that:

(a) The trial court did not instruct the jury as required by the decisions of this Court in *C. & O. v. Kelly* and *C. & O. v. Gainey*, 241 U. S. 485 and 494, that the contributions that deceased might have made to the beneficiaries through his continued life should be reduced to present value; and that the instructions given were not sufficient to convey to the minds of the jury the rules laid down in such cases; and that the jury should have been specifically told that they would assess plaintiff's damages "at the present value of the contributions in money"; and should have been given a proper rule and formula by which they might determine such present value; and should have been told that they should reduce the contributions to the present value at *the highest rate of interest they found could be had on money safely invested.*

(b) It is clear from the record that the rule of the Kelly and Gainey cases has not been followed in this case and that the award is clearly in violation of and in excess of what would be a proper award under the rule; and in that connection that the testimony of the jury shows that they made no attempt to reduce to present value—that they did not understand that such was required of them, and it is apparent from the record that the award was figured and made under the rule laid down by the Kentucky Court in the Kelly and Gainey cases, and not by the rule of this Court.

(c) The trial court erroneously failed to instruct the jury on the measure of damages, that they would consider in reduction of damages, the value of the services that the wife and child would have rendered the deceased had he not been killed; the probability, if any, of Mrs. Moser marrying again; the probability, if any, of reduction of wages of deceased by reason of return to normal conditions after the abnormal conditions of the war; the probable diminution of income of deceased reasonably to be expected from advancing age, sickness and being out of employment, etc.; and the hazardous nature of the employment in which he was engaged.

(d) The trial court erred in submitting to the jury the element of nurture, advice and training by the deceased father under this record as a matter of pecuniary value to the child.

CASES SUSTAINING JURISDICTION

Being an action brought expressly to enforce a liability under the Federal Statute, the questions are Federal.

St. L. I. M. & S. Ry. Co. v. McWhirter, 229 U. S. 256, 57 L. Ed. 1179.

St. L. I. M. & S. v. Taylor, 210 U. S. 281, 52 L. Ed. 1061.

Seaboard Air Line v. Duvall, 225 U. S. 477, 56 L. Ed. 1171.

Seaboard Air Line v. Horton, 233 U. S. 492, 58 L. Ed. 1062.

"The question of proper measure of damages is inseparably connected with the right of action, and in cases arising under the Federal Employer's Liability Act it must be settled according to the principles of law as administered in the Federal Court."

C. & O. v. Kelly, 241 U. S. 485, 60 L. Ed. 1117.

C. & O. v. Gainey, 241 U. S. 494, 60 L. Ed. 1125.

North Carolina v. Zachary, 232 U. S. 248, 58 L. Ed. 591.

STATEMENT OF THE CASE

Mrs. Olena Moser, setting up her appointment as administratrix of the estate of her deceased husband, John H. Moser (R. 2), brought suit against petitioner, the Gulf, Colorado & Santa Fe Railway Company, charging that at the time her husband received the

injuries which resulted in his death defendant (petitioner) was engaged in commerce between the states and that her husband was employed by defendant "in such interstate commerce and at the time he received such injuries was in the performance of his duties under such employment" (R. 2); and that while so employed and acting as brakeman on the train of defendant and operated by it, he fell through the floor of a car and was run over and killed (R. 3); that she was the surviving wife and that he left one surviving child (R. 3); negligence being alleged in that the floor of the car had become so rusted, eroded and worn that it would not sustain the weight of a man stepping on the same, etc.; and that while in the performance of his duties Moser stepped upon the floor and fell through the same upon the track and received his injuries, etc. (R. 4.)

That Moser met his death by the iron or steel floor of a coal car giving way as he was passing over the car causing him to be run over and killed was established (Testimony of J. F. Francis, R. 89-91; E. E. Baldridge, 94-96; C. G. Tigler, 112-114), and the parties plaintiff and defendant agreed upon the trial in open court "that at the time of his death Mr. John H. Moser was in the employ of Gulf, Colorado & Santa Fe Railway Company as a brakeman on a train en route from Temple to Bellville, which train carried interstate freight and interstate commerce, and that the defendant was at that time engaged in interstate commerce as a carrier, and that the deceased Moser at the time he received his injuries resulting in his death was in

the performance of his duties relating to interstate commerce." (R. 81-82.)

The car was a car of the Pennsylvania Railway System and it was shown by the testimony of defendant that it was in active service on the eastern railroads from about the 22nd of January, hauling heavy loads, coal, etc., till it was loaded in Pennsylvania with pipe about the 12th of April, for this trip (R. 98-102), and that it came to this defendant at Gulf Junction from the Atchison, Topeka & Santa Fe Railway (R. 102), and was given the usual inspection at Gainesville on defendant's line (R. 107-109) without the discovery of any defects that were regarded as dangerous or material and car was traced by defendant through its train crews from Gulf Junction to Temple, Texas, no defect that attracted notice being discovered by the crews (R. 102; 105; 106; 109 to 111), and the car was in a train out of Temple south when Moser met his death.

In answer to special issues under instructions of the court the jury found that while in the performance of his duty, Moser stepped upon the floor of the car in question, fell through and was killed; and that the defendant was transporting in one of its trains the car on which Moser was riding, the floor of which through use, rust or exposure was unsafe, and was negligent in so doing and that such negligence was the proximate cause of his death (R. 19-21).

As the questions presented relate only to the measure of damages, instructions thereon, given and refused, and the improper assessment thereof, from

this point on this statement will be confined to the portions of the record bearing on the question of damages.

TESTIMONY AS TO MOSER'S EARNINGS AND THE VALUE THEREOF

The death of Moser occurred April 23, 1923. He was then 28 years of age (R. 79). If engaged in the ordinary avocations of life he would have had under the American Experience Tables an expectancy of 36.73 years (R. 122 and 92), but in the hazardous occupation of brakeman insurance companies reduce the expectancy to 31.7 years (R. 122).

At the time of Moser's death his wife was 27 and his child about two years old (R. 79).

For the period from July 1, 1921, to April 23, 1923, that is for the 21 months and 23 days prior to his death, Moser's earnings were $3271.83 (R. 150), or approximately $150.00 per month, under the wage scale prevailing.

At the peak of the high wage scale the result of the great war testified to as being "the highest wages ever paid railroad men in this country" (R. 150), he made a little more than this for a little more than a year (R. 150), but prior to that time his monthly earnings were much below $150.00 per month (R. 150).

C. C. Grazier, witness for plaintiff, testified:

That at the time of Moser's death he was the twenty-seventh man up for promotion as conductor.

"That promotion does not take place by any regular rule; no regularity whatever. The conditions upon which it depends vary right along. It is also true that the railroads are constantly using larger engines and larger trains that result in the movement of fewer trains, and this results in decrease of men needed. Then as larger equipment and larger power are used for economical use of railroads the chance of promotion for a particular man becomes less and less and becomes more remote."

That at the time of Moser's death the railroad had more men promoted than they needed—that three men had been promoted since his death (R. 83).

Taking into consideration the time he had been in service, the earliest probable time that he would have been in line for promotion would have been six or seven years or better (R. 84).

That being promoted did not mean he was going to commence running as conductor; "for a good long time after he was promoted he would very seldom run as conductor; would be on extra board and retain his rights as brakeman and the bulk of his work would be performed as such; that after passing his examination and being placed on the roster as emergency conductor he would be called upon if he is the oldest man available at the terminal; this would occur once in a great while in his early service as conductor; more often as time goes on; he still would perform brakeman service and the bulk of his work in the early years after promotion would be as brakeman (R. 84).

"That judging by his past experience Moser would not likely have had a regular run as conductor for from fifteen to seventeen years from the time he was promoted.

"That it was his estimate that it would be in the neighborhood of twenty-three years from the time of his death before he would have a regular run as conductor.

"That the probability of his ever getting to be a passenger conductor was very vague; promotion is slow due to increase in power, larger engines; the more cars we haul per engine, the less trains we run, and the less trains the less men; the probability of a man reaching promotion now as they did years back is very remote. It would be at least 23 years before Mr. Moser would receive a regular run as conductor; that would be through freight or chain gang service —the class of service the new men have to take in view of the fact that the older men take the best runs like locals. Taking these figures, Mr. Moser would have been a very old man if he ever reached a position of passenger conductor" (R. 85).

That there were 101 men on the roster between the man next in line for passenger work and Moser. "In my judgment there was not any reasonable probability of Moser ever reaching a passenger run."

"Ten years after Mr. Moser would have been promoted to be conductor, that is ten years after six or seven years from now—after he had been a conductor for ten years, and predicated on the present scale of wages, the ones prevailing now, taking into considera-

tion the previous performance of other men for that length of time, I will state that the reasonable earnings of a man at that time would be between $2100.00 and $2200.00 per year. I am sure that it would be ten years after he had reached that period of earning capacity before he would get a regular run. It would be anywhere up to fifteen years or maybe better before he would get the regular run" (R. 86). That the maximum he could reasonably expect before he got a regular run would be about $2200.00 or $2250.00 (R. 86).

As to what he would get if he had a regular run in chain gang service as conductor "that would vary with the amount he laid off; if he was a steady worker it would run from $2500.00 to $2700.00 taking the entire year into consideration."

"If everything were all right with him then, for some twenty-five or thirty years, twenty or twenty-five years from the time of his death, he might get up to $2500.00 or probably a little better; that is based on my knowledge of what other men have done. It is true that there is a very great fluctuation in the amount that the men make. Business fluctuations, some men hold up better and keep better health, and some men are more steady workers than others. Some have more sickness and fall down. What I have stated is the maximum reasonably probable with a man that works fairly steady" (R. 86-87).

This testimony by Grazier and the figures offered by him were not disputed and defendant submitted on the trial to a qualified actuary a table of probable

earnings of Moser made up on the basis thereof, as follows:

For the first 7 years from the time of his death, that is until he might be promoted, at $1800 per year —approximately what he had been making for twenty-two months prior to his death.

For 16 years (mean between the 15 and 17 years the witness figured it would be before he would have gotten to the point of making $2250.00 per year) at $2050.00 per year, this being a little more than an average between what he would start with, $1800.00, and what he would attain by the end of the period, $2250.00.

For the remaining 14 years of his outside expectancy (that is an expectancy of one in the ordinary walks of life—really not Moser's expectancy at all), a mean between $2500.00 and $2700.00—what the witness testified he might possibly make when he had obtained a regular run, or at $2600.00 per year.

On this basis these figures show for Moser a gross income:

For the first 7 years of $1800.00 per year.
For the next 16 years of $2050.00 per year.
For the next 14 years of $2600.00 per year.

On the assumption that Moser would have spent at least one-third of his income on himself—for his own upkeep and expenses—the defendant developed from the actuary the present value of two-thirds of Moser's possible earnings as above stated, to-wit: that the present value of two-thirds of such earnings

At 6% would be $21,845.00
At 7% would be $19,439.00
At 8% would be $17,446.00 (R. 125).

This witness explained in detail about the Mortality Tables and how they were made up and the difference made between the expectancy of men in ordinary vocations of life and those in hazardous callings and why, and what was meant by present values and how they were figured out and determined on, and on what basis and how he applied these figures to Moser's earnings as above set forth. (R. 121-125.)

The same witness testified that $10,000.00 at 6% will in ten years amount to $17,910, and in 12 years to $20,120, and in 20 years to $32,070, and in 30 years to $57,440.00 (R. 125).

On cross examination by plaintiff's counsel the witness testified: "Taking $1,800 for seven years, $2,050 for sixteen years, and $2,600 for fourteen years, the total earnings and not two-thirds of it, and figuring the interest at four per cent, the present cash value is $42,416.00." (R. 125.)

By an insurance agent plaintiff showed that an annuity of $1800 per year for one 28 years of age at 4% would cost $33,048; and of $2000.00, $36,720; of $3000, $55,080. (R. 92-93.)

Verdict of the jury was for $34,000, apportioned $18,000 to Mrs. Moser and $16,000 to child (R. 27-28), and judgment accordingly (R. 28-29).

The only other testimony bearing on the question of damages was:

Mrs. Moser testified:

"When off duty Mr. Moser was in the habit of staying at home. He loved his baby and loved to take her around, and loved to stay at home and help me.

"He had no bad habits.

"When off duty in Temple he always stayed at home with the baby. He was always called at home." (R. 78.)

Mr. Moser was raised out on the western branch of the Santa Fe.

"He had just had a public school education; had gone through the public schools at Valera" (R. 79).

And recalled she testified that Mr. Moser did not contribute any of his earnings to any other person than herself and her child; did not send his father money; "not in our married life, we needed it ourselves. He was not able to do anything for his father, in fact his father had helped us when we were first married." (R. 96.)

Mrs. N. A. Shanklin, for plaintiff, testified:

"That she knew John H. Moser in his lifetime; had known him for ten years; knew him well; knew him to be a good man, devoted father and husband, and a man who loved his family." (R. 91.)

TESTIMONY AS TO INTEREST RATES IN TEXAS

ED TEMPLE, a conductor in the employ of the Santa Fe, who lived at Temple, Texas, testified:

That he had been putting out money at interest at Temple, and had gotten eight to ten per cent with real estate as security, "safe security." The party borrowing the money paid the expenses. That he had been doing this for twenty years; that he was doing it at the time of trial; had no difficulty in putting it out at any time he wanted to. He put it out for others and helped them to put it out. (R. 97.)

BRIT STANTON, manager of the Cameron Lumber Yard at Temple, testified:

Cameron & Company in connection with their business sell vendor's lien notes on new residences and city property, and have been doing that there in Temple ever since he has been there—since 1919; for the last four years. Has been with the firm at other places and the same practice has prevailed.

"Up until the time the war came on we kept all that paper ourselves, because we considered it a good investment, but after the war it took so much more money to run our business, that we decided to discontinue that practice and what paper we have had since that time we have had it for sale.

"The rate of interest was eight per cent, that is what people who took it over from us got. The party who gets the money pays the expenses incident to the examination of title, passing on the loan, brokerage

fees, etc. The eight per cent is net to the lender. The security is mechanic's or materialman's first lien on the house or property at approximately fifty per cent valuation of the property. The security of those loans is the very best of security."

(NOTE: This case was tried at Belton, county seat of Bell County, and Temple is the largest city in that county and is eight miles from Belton, where the estate was being administered, R. 2.)

JAMES HARRISON, for defendant, testified:

That he had been in the loan brokerage business fifteen years at Fort Worth, Texas, and during that time had loaned approximately two millions of dollars, original and renewed loans.

"Eight per cent had been the prevailing rate. I do not remember but one loan less than that; some few were placed at more than that, ten per cent, a very few. These loans were placed on real estate at about fifty per cent of the fair conservative price of the real estate. As to whether these loans were safely placed, I have only had one foreclosure in the notes I have handled, and that was $2,500 and the owner of the note was offered $3,000 after the foreclosure proceedings; there has been no loss whatever.

"The borrower has invariably paid the expense of the loan, examination of title, recording fees of all papers, and all expenses whatever, and the eight per cent was net to the lender. I can place all I can get now at those figures, within a reasonable time; a man of course could not go out and place it on the spur

of the moment. That is my business; I am doing that right along in Fort Worth."

On cross examination by plaintiff's counsel he testified:

"Q. You know that it is true that in large volumes in Texas and other parts of the country on gilt-edged securities money returns $3\frac{1}{2}$ or $4\frac{1}{2}$%?

"A. There is not as much loaned—there is more loaned at higher rates.

"Q. I am asking you if that is true?

"A. Some large investments have been made in government bonds of course.

"Q. Don't you know that in this country now that on any large loan of real estate that you can get all the money you want at six per cent?

"A. I don't know about that. On choice business property money is had at six per cent." (R. 80.)

On re-direct he testified:

"In placing this money for people who give me money to invest I give them the benefit of my judgment and experience in placing these loans and in protecting them and placing them; that is what I sell them; but it is paid for by the borrower." (R. 81.)

C. G. CLOUD, who had been in the real estate business in Dallas about fifteen years, testified:

That money could be placed in Dallas on real estate security, residence property, at an approximate fifty per cent valuation at eight per cent; "that is about

the regular rate of interest prevailing for that character of loan," and had been ever since he had been in business. " * * * The borrower pays all the expenses. * * * That is about the way loans are placed there. * * * I have no difficulty in placing money on that basis. * * * I furnish the experience to the people who trust their money to me to loan—I pass on securities for some of them—they can get that experience from prominent brokers without expense to them, perfectly responsible men who are in business all the time. The borrower pays the fee for the broker's trouble and expenses." (R. 117-118.)

On examination by plaintiff's counsel, he testified:

"I don't know that men of great capital and means who have opportunity to invest their capital in this country prefer to put it out at three and a half or four per cent instead of loans on town property." (R. 118.)

W. W. THOMAS, residing at Houston, who had been in the real estate business there for forty years, making loans, etc., testified:

"Money can be placed in Houston on real estate, good residence property, at approximately fifty per cent of its value and to net the lender on entirely good safe loans without risk to them, eight per cent, and it don't make any difference about the size of the loan. * * * Eight per cent is the prevailing rate now."

On examination by plaintiff's counsel he testified:

"Q. Do you know why it is that men of large

capital and means in Texas and elsewhere prefer to invest their capital in three and a half to four per cent securities instead of intrusting it to you to loan for them in Houston?

"A. I wont' admit it." (R. 119.)

M. MAVERICK, in the lumber business in San Antonio, working for a company that builds and finances houses, testified:

"Money can be placed in the City of San Antonio on safe, entirely safe, real estate security, residence houses, not exceeding fifty per cent valuation, net to the lender at eight per cent. * * * Our concern has loaned in the last ten years an estimated amount of $10,000,000.00 at that rate and in excess of that; net eight per cent and some more.

"There is no difficulty in placing money in safe securities in San Antonio now." (R. 120.)

Fort Worth and Dallas are to the North of Bell County; Houston, Southeast; and San Antonio, Southwest; and range from about one hundred thirty to one hundred fifty miles from Bell County, and being in different parts of the state may naturally, we take it, be taken as reflecting the market of the state.

In any event no testimony contrary to that given by these witnesses was offered, and the facts testified to by them are undisputed in the record.

CHARGE ON THE MEASURE OF DAMAGES

After submitting the issues covering the question of liability the court instructed the jury on the question of damages and submitted a special issue with reference thereto which, with the answer of the jury, was as follows:

> "Regardless of what your answers may be to the questions submitted in this charge, you will assess damages, and you will arrive at the amount thereof by assessing the same at such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss as you may believe from the evidence that they had a reasonable expectation of receiving from said John H. Moser, if any, from and after the death of the said John H. Moser, if he had not died on the date alleged. By pecuniary loss is meant such loss as may be compensated for in money. In answering special issue No. 7, you will take into consideration the contribution of money and other pecuniary benefits, if any, which the evidence may show that said surviving wife and child would have received from him after the time of his death, if he had continued to live; and in estimating the pecuniary loss suffered by the minor child of the deceased by reason of his death, you may take into consideration such advice and training, if any, as the evidence may show that the child would have received from deceased after the time of his death, if he had continued to live, but in determining the amount of damages that you may award, if any, to the minor Mary Virginia Moser, under this

charge and under special issue No. 7 and the apportionment of such award, you will confine yourselves in the consideration of such contributions that the deceased Moser might have made to his said minor child to the period of her minority.

"But you are instructed that you can not consider for any other purpose the solace or grief or loss of society and companionship suffered by the deceased's widow and child, or either of them by reason of his death, or for grief and distress on account of his death, and you can not award them or either of them any damages by way of solace or comfort for the death of the deceased; and in assessing the damages, if any, you will confine yourselves solely to the determination of the pecuniary and monetary interest, if any, that the plaintiff and her child had in the continued life of deceased.

"If you have answered special issue No. 5 'yes,' then you are charged and instructed that in assessing the damages, you will diminish the same in proportion as—find that such failure, if any, on the part of the deceased, to exercise ordinary care for his own safety contributed to the accident complained of.

"Bearing in mind the foregoing definitions and instructions on the measure of damages, you will answer special issue No. 7.

Special Issue No. 7

"What amount of money, if paid now, will fairly and reasonably compensate the surviving widow and child of the deceased, John H. Moser, for the actual pecuniary loss which they respec-

tively suffered by reason of his death, if any? This question you will answer by stating the aggregate amount of such pecuniary loss or damage and you will answer in the space below the amount you find from the evidence.

"Answer. $34,000.00. J. E. Hudson, Foreman." (R. 21-22.)

OBJECTIONS TO THE CHARGE ON THE MEASURE OF DAMAGES

At the proper time and place defendant submitted objections to the court's charge which were in all things overruled (R. 26) as follows:

(a) The Court instead of telling the jury that they will arrive at such sum as if paid in cash at this time will be sufficient to fairly compensate the surviving wife and child, etc., should tell the jury that they will assess the plaintiff's damages at the present value of the contributions in money (or other thing of value, if there be any other thing of value to be considered under the testimony, which defendant denies) that they may find from the evidence deceased would probably have made if he had continued to live, and should explain to the jury how such present value of such contributions may be determined under the evidence, and confining them to that portion of the evidence which affords a basis for the determination of such present value. (R. 24.)

(h) Because said charge on the measure of damages is generally too broad and not definite and specific enough and the jury should be limited in their

consideration of the measure of damages, and the damages to be awarded, and should be further and more in detail instructed as to matters they can consider and the way their verdict should be arrived at more fully shown and in line with defendant's requested charges on the issue of damages. (R. 25-26.)

(a) (To special issue No. 7.) It does not give the jury any rule or formula by which the jury may determine the amount of money that if paid now will fairly and reasonably compensate the surviving widow and child for the actual pecuniary loss, etc. (R. 26.)

(d) Because said charge in so far as it submits to the jury the question of such nurture, advice and training, if any, as the evidence may show the child would receive from deceased if he had continued to live, because there is no evidence that the child would have received from the deceased any nurture, advice or training of any character whatsoever, there being no testimony upon the subject; and there is no evidence that he had any qualifications or training that qualified him to render service in the way of nurture, advice or training; or such would be of value, and there is no evidence that any nurture, advice or training that he might have given his child had any pecuniary value and if so what it was, or that it was capable of being compensated for in money. (R. 25.)

(e) Because the recovery for pecuniary benefits on the part of the wife, Mrs. Moser, is not confined to the period of her widowhood or until she may marry again, to be determined by the jury. (R. 25.)

SPECIAL CHARGES ASKED AND THE REFUSAL OF WHICH IS COMPLAINED OF

The special charges were asked at the proper time and place and proper bills reserved to the refusal to give. (R. 7-17.)

Special Charge No. 8

"In considering of your verdict on the question of damgaes, and under the special issues submitted to you in that connection, and thereunder in determining 'such sum of money as if paid in cash at this time would be sufficient to fairly compensate the surviving wife and child,' for their pecuniary loss, you are instructed that in determining the present value of such contributions as plaintiff would probably have received from the continued life of the deceased, you will make your calculations on the basis of the amount of your award bearing interest at the highest net rate of interest that the testimony shows can be had on money safely invested, and secured as shown by the testimony in this case." (R. 9-10.)

Special Charge No. 9 (In Substance)

That the jury would consider the wife's duty to render service to her husband and determine from the evidence the character of service Mrs. Moser would probably have rendered as wife and the draft that would have been made on her time, energy and strength in rendering such service, and the rendering of which she was relieved by his death, and determine the reasonable present cash value of such service

and deduct the same from the present cash value of the pecuniary contributions that Moser would have made to his wife had he continued to live, and that the difference between such values would constitute their award of damages under Special Issue No. 7. (R. 10-11.)

Special Charge No. 10 (In Substance)

Is special instruction in the same general form and to the same effect covering the feature of services that the child would be required to render to the parent and which was saved to her.

Special Charge No. 3 (In Substance)

Instructing the jury to consider the probability that "Mrs. Moser may marry again (and this question you may determine from your experience and judgment) and to confine the award of damages in her behalf to the period of her probable widowhood as they determine same." (R. 7-8.)

Special Charge No. 4

> "You are charged that under the law and the evidence in this case, you will not allow the plaintiff anything on account of any benefit for 'the benefit of a father's care, training, advice and counsel as set up in plaintiff's petition, and you will not allow the plaintiff anything on account of any such matters or take any such matters into consideration in determining your verdict." (R. 8.)

And in the alternative

Special Charge No. 11

"In the consideration of 'such nurture, advice and training, if any, as the evidence may show the child may receive from the deceased after the time of his death,' as such matters are submitted to you in charge, you will consider only such nurture, advice and training, if any, as of a character that can be measured by a money value, that is, such as could be supplied by the services of another for compensation, and in the assessment of damages, you will not allow anything on behalf of the minor plaintiff as to such matters except to the extent and insofar as you may believe from the evidence such nurture, advice and training will have to be supplied and will be supplied by the services of another secured for compensation." (R. 12-13.)

Special Issue No. 17 (In Substance)

That in determining the probable contributions they would consider possible decrease in wages or earnings, if any, as you may believe will reasonably result in the future, if any, from the return from the abnormal or unusual conditions the result of the great war the country has recently gone through, to normal or usual conditions, that is, such conditions as might reasonably be expected to exist when the influence of the war and the conditions arising out of it are removed, if you find that such a return will probably come, etc. (R. 13-14.)

Special Instruction No. 18 (In Substance)

That in determining the question of probable contributions they would take into consideration such reasonable decrease in his earning capacity as was reasonably to be expected from advancing age, and such diminution in his income as might reasonably result from such loss of time as he may have from sickness or any other cause, or the reasonable probability, if any, of his being out of employment from any cause (determining such matters in the light of your experience in human affairs) and you will give to each and all of such matters such consideration and weight in the determination of the amount of contributions deceased Moser would probably have made to his wife and child, as you think they are entitled to, etc. (R. 14-15.)

Special Charge No. 24 (In Substance)

That in determining the question of damages they would take into consideration the likelihood of the earnings of the deceased becoming less during the latter years of his life had he lived and also any period of the time that his earnings might cease due to sickness or any other causes, if any, that would in any way lessen his ability to contribute to his family, etc. (R. 15-16.)

Special Charge No. 25 (In Substance)

That they would take into consideration the hazardous nature of the employment in which Moser was at the time engaged and make such reduction of possible earnings as they think ought to be made. (R. 16.)

TESTIMONY OF THE JURY

Under Article 2234, Revised Statutes of Texas (old 2021) misconduct of the jury being charged in the motion for new trial (R. 49) the testimony of nine of the jurors was taken on the hearing of the motion and is set forth in bill of exceptions taken by defendant (R. 61 to 77).

Extracts from this testimony will be made sufficient to show clearly that the jury did not understand from the court's charge that they were required to reduce the contributions through the years to present value and considered no such matter and made no attempt to reduce to present value, and that the expression in the charge "at this time" did not remotely suggest to the minds of the jury that they were to reduce to present value.

J. J. MILLER testified that on the first ballot he was for $30,000.00. As to how he arrived at his verdict he testified: "My process was taking $1800.00 as his earnings, as shown by the testimony, and I figured he would spend half of that on himself, and I took the other $900.00 which he would contribute to his family, and took thirty-six years, his expectancy, and multiplied that together, and that netted about $32,000.00, and I lumped it off at $30,000.00. I made no attempt to reduce it to a present value." (R. 62.)

T. E. HOUSE testified that on first ballot he was for $35,000.00. "As to how I arrived at that in my own mind, as I understod the charge of the Court it charged us to issue this lady a certain amount of

money which would be sufficient to support her and her child, and I felt it would take that to support her for thirty-six years, and a fraction over. • • • I figured $1000.00 a year for thirty-six years would be $36,000.00, and I knocked it down to $35,000.00. • • • I did not undertake to figure what interest the amount of money I allowed would bear; I did not understand the charge that way. I was just to find out the sum, the amount of contribution he would probably make during the years, that was the way I understood the charge. (R. 62-63.) • • • That was about the same method the other jurors were apparently using, several I know—multiplying the contribution by thirty-six years, his life expectancy, and endeavoring to arrive at a verdict in that way. Some differed as to what figure they would take as annual contribution, but everyone was using that same method as far as I know. (R. 63.) • • • I did not undertake to use any six per cent or seven per cent or eight per cent interest, to reduce the amount of my verdict to a per cent value; I did not understand it was my duty to do so under the Court's charge." (R. 63.)

M. L. HOUSE testified he was for $40,000.00. "I figured it would take that much to support this woman and support this child and educate this child. • • • I did not figure how much Mr. Moser would have contributed to Mrs. Moser at all; that was not in the Court's charge. (R. 64.) • • • I did not figure any rate of interest that $40,000.00 could be made to make, did not figure it at all. (R. 64-65.) • • • to see what she could make out of it. I did not take into con-

sideration any earning capacity the money would bring; I just figured what it would take to support this woman and child; that is, if she had drawn from year to year out of the money that was given to her. • • • The Court did charge us that we should allow to the plaintiffs such an amount as if paid at this time would compensate for the loss they had sustained by reason of his death. That is the way I tried to arrive at it. (R. 65.) • • • On the first ballot, without any attempt by the jury to make any mathematical calculation, each juror merely wrote down what verdict he was in favor of. Six of the jurors were for $30,000, one for $35,000 and five for $40,000. At no time did the jury enter into any mathematical calculations figuring rates of interest or the values of annuities or discuss any particular evidence along those lines." (R. 66.)

J. E. HUDSON, foreman of the jury, testified: "On the first ballot I voted for $40,000.00. As to how I arrived at that amount in my own mind, I sorter figured on the basis of what the man was receiving at the time of his death, $1,800 per year. (R. 66.) • • I thought he would give two-thirds of the $1800 to the family, something like that; about $1200 per year to the family, and I multiplied that by thirty-six, his expectancy; • • • $1200 by thirty-six years would be $43,200 and I just lumped it off roughly at $40,000. • • • I don't know that I figured on about what any amount of money would earn. Q. You just figured an amount that would be put in the bank and would be drawn from year to year, considering that

as his contributions of money to his family? A. I took into consideration what he made. Q. A sum that could be drawn out without regard to anything being put out at interest at all, which would make up what he would have been able to contribute to his family if he had lived, that is the idea? A. I believe it was. * * * I don't know that I took into consideration what that particular sum might earn at any rate of interest. * * * The process I went through, something of that kind, was about the process of all the jurors that I heard, I did not hear all of them; * * * the majority was finding a verdict by multiplying some sum by thirty-six and some odd years. (R. 67) * * * I knew that his total earnings, from the testimony would have run up to more than $80,000, based on $2300 a year; and I was merely trying to arrive at the present value paid in hand in cash at the time of the pecuniary loss which they had sustained, under the court's charge. I made no calculation whatever as to what money paid at this time might be made to earn." (R. 68-69.)

J. Y. MORELAND testified he was for $30,000. "I figured it would take something like that much to give the woman and child support, of course taking into consideration the salary the man was drawing; $1800 a year I believe was what was figured. * * * I considered something like $900 a year for thirty-six years. * * * and in round numbers I voted for $30,000. * * * I did not figure it at seven or eight per cent or any other rate that the money could be made to bear. (R. 69.) * * * I had an idea what that money would earn—$30,000 a year, I knew it would earn $1800 at

ix per cent. I did not figure what amount, if paid ow, taking $900 as a basis per year, if put out at nterest would absorb itself at the end of thirty-six ears." (R. 69-70.)

E. W. DUNLAP testified on first ballot he was for 30,000. "I just figured that it would about take that o do what the judge said for us to do. The charge aid to give her a sufficient amount of damage to ducate the child and support Mrs. Moser, and that what I undertook to do when I first thought of 30,000 as my vote. Mr. Moser's earnings and what would make did not have anything to do with it. R. 71.) • • • I did not at that time undertake or try reduce annual payments of so much per year by eans of contributions each year to a present value figuring how much money that money could be ade to make. I did not figure that at six per cent seven or eight per cent or any other per cent. . 71-72.) • • • The charge just said to give her ough damages to educate the child and take care Mrs. Moser. That may not be the words, but I ink that is the substance of the charge. • • • I unrstood we should take into consideration what he s earning and should pay them at this time what uld justly compensate them for the pecuniary loss y had sustained. I did not undertake to give to m what I thought he would contribute to them dur- his entire life if he had lived, but to pay them at s time what would justly compensate them for the s they had sustained." (R. 72.)

R. N. CASS testified he was for $30,000. "We did consider how much he might have contributed each year to his wife and child, and as near as I remember it, multiplied that by thirty-six years that he had to live. * * * I did not make any calculation at interest at eight per cent or six or seven per cent. I made no attempt to reduce the payment paid annually to a present value—to calculate how much if paid now would amount to the same as a payment made each year at a given rate of interest." (R. 73-74.)

R. H. GILES testified on the first ballot he was for $40,000. "I just figured it would take that much to maintain this woman and educate that child, I believe the man would have done it, had be lived. * * * The charge of the court was that we would give this woman an amount that would maintain her and this child, and that is what we undertook to do. I considered that he would have contributed to his family about half of his income anyway, and multiplying that by thirty-six would be something around $40,000, more than that; that is about the way I figured it in my mind. Wasn't anything said about interest, and I did not attempt to reduce it to a present valuation." (R. 75.)

J. F. DUBOSE testified he was for $40,000. "I did make calculations in my head; the charge says that we were to do that and I believe Mrs. Moser, the way the present living was, that it would take $40,000 to keep Mrs. Moser and the little girl up and educate the girl. That is the way I arrived at it as near as I can tell you now. I did not figure any interest because

the charge did not say so. I don't believe I did figure any interest. I figured it was like this: that it was Mrs. Moser's business after the money was paid to her to do as she pleased with it and I thought if she wanted to put it out at interest it was her business; the charge said to give her in a lump what was to keep her up and that child, that is the way I understood it. I made no allowance as to what that money could be made to earn; I did not consider it that way." (R. 75-76.)

SPECIFICATION OF ERRORS ASSIGNED AND INTENDED TO BE URGED

(1) The brief and indefinite expressions of the Court's charge to assess the damages "at such sum of money as paid in cash at this time would be sufficient to fairly compensate the surviving wife and child" for the actual pecuniary loss, and they should find what amount of money "if paid in cash now would fairly and reasonably compensate the surviving widow, etc.," are not sufficient to convey to the minds of a jury the rules laid down by this Court in *C. & O. v. Kelly* and *C. & O. v. Gainey*, 241 U. S. 485 and 494; that the charge as given is open to the defendant's objections that it was not definite and specific enough and that the jury should have been told that they would assess plaintiff's damage *"at the present value* of the contributions in money"; and charge should explain to the jury how such present value of such contributions may be determined from the evidence; and it did not give the jury any rule or formula by which they

might determine the amount of money as if paid now would fairly and reasonably compensate, etc.

(2) Defendant was entitled to have its special charge No. 8 given, specially in view of the vague and indefinite expressions used by the Court in its charge on the question of reduction to present values. It is the definite holding of this Court in the Kelly case that "in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award"; and it was undisputed that money could be made to earn safely in Texas net 8%, but conceding that the right of the Court to fix that as a rate might be open to question, it is certainly the law that it was the jury's obligation to reduce the contributions at the highest rate of interest they found the testimony showed *could be had on money safely invested.* The special charge as asked leaves it to the jury to determine what such rate was but charges them with the obligation to determine *such a rate* and *use it* in reducing to present value.

(3) The record shows that the amount of the award will yield the plaintiffs yearly throughout their entire lives at reasonable rates of interest even more than the entire annual earnings of the deceased and leave the principal intact at the deaths of the beneficiaries; and under any rates of interest entitled to be considered, bring in every year during their lives more than any probable contributions of deceased and still leave the principal intact at their death. And it

is absolutely clear that the rule of C. & O. v. Kelly has not been applied in this case and that the award is clearly in violation thereof and grossly in excess of what would be a proper award under the rule.

(4) The testimony of the jury shows unqualifiedly that the defendant's exceptions to the charge were well taken; that the jury would not understand therefrom that reduction to present value was required; and that as a matter of fact no attempt was made to reduce to present values; and that the award was made under the rule laid down by the Supreme Court of Kentucky and not under the rule of this Court.

(5) By the death of Moser his wife and child were relieved of service to him that the relationship cast upon them and defendant was entitled to have the jury instructed that such savings of service should be considered by them in reduction of any award they might otherwise make.

(6) That a woman as young as Mrs. Moser would marry again was altogether reasonable and the just and sound rule is that such probability should be considered by the jury in determining the damages.

(7) There was nothing in the evidence to show that Moser had by temperament or training any qualifications that would render any nurture, advice or training by him a matter of pecuniary value. In any event, the only elements of that character that could be recovered for were such as had pecuniary value; that is, such as could be supplied by another for compensation and the jury should have been instruct-

ed elements of such character only could be considered.

(8) Defendant was entitled to have its special instructions given directing the jury to consider the probability, if any, of a reduction of wages by reason of return to normal conditions after the abnormal conditions of the war; the probable diminution of income reasonably to be expected from advancing age and from sickness and being out of employment, etc.; and the hazardous nature of the employment in which deceased was engaged.

NOTE: The assignments or points upon which petitioner intends to rely as set forth above were raised by motion for new trial in the District Court (R. 29-49) and carried forward as assignments of error under the Rules of Practice in Texas Courts and by appropriate propositions, statements, etc., presented in the Court of Appeals of Texas (R. 152), and such points were presented to the Supreme Court of Texas in the application for writ of error (R. 133-141) with propositions and statements and arguments and authorities thereunder, presenting such points to such Supreme Court (R. 133-141 and 152), and motion for rehearing in such Court of Civil Appeals and such Supreme Court made in the time required by law, and such points intended to be relied on as above set forth were re-urged before said courts. (R. 153.)

ARGUMENT

Summary

(1) It is evident from the record that the verdict in this case was reached without any attempt to reduce the contributions through the years to a present value—that is that the verdict was determined on the rule laid down by the Kentucky Court in the Kelly case and condemned by this Court, and therefore, under the rulings in *C. & O. v. Kelly* and *C. & O. v. Gainey*, the judgment below must be reversed.

(2) The testimony of the jury absolutely confirms this clear deduction from the record and establishes affirmatively that the rule of the Kentucky Court was followed and the rights of this defendant under the rulings in the Kelly and Gainey cases wholly ignored.

(3) That the charge of the court did not properly or fully present the rule of the Kelly and Gainey cases —that is that the contributions to be expected through the years must be reduced to a present value, by taking into consideration the earning power of the sum presently to be awarded—indeed, did not carry this rule to the jury at all; and the defendant's objections to the charge should have been sustained, and the rule presented in such manner that there could be no doubt about the jury understanding it.

(4) That the requested special charge No. 8 telling the jury specifically that in determining the present value of the contributions that they would make their calculations on the basis of the amount of their

award bearing interest at the highest net rate of interest that the testimony showed could be had on money safely invested and secured.

(5) That the court should have instructed the jury as requested by defendant, that in determining their award they would make deduction and allowance for the value of the services of the wife to the husband and of the child to the parent, of which the wife and child were respectively relieved by the death.

(6) That the court should have instructed the jury as requested by defendant to consider the probability of Mrs. Moser marrying again, and confine her damages, if any, to the period of her probable widowhood.

(7) That under the record in this case, there being nothing to show deceased had any qualifications that would render any advice or training by him a matter of pecuniary value or of such character as could only be supplied by another for compensation; or that any training, advice or nurture that he might furnish had any pecuniary value, such element should not have been submitted to the jury but they should have been instructed to disregard the same.

(8) That the trial court should have given the special instructions requested by defendant directing the jury to consider in connection with the question of damages the probable effect on deceased's earnings of a return to normal conditions after the abnormal conditions of the war; and of the effect of advancing age and possible sickness, etc., and the hazardous nature

of his employment and their probable effect on his earning capacity.

The Act of Congress cited above, Compiled Statutes 1918, Section 8657, provides an action for employes of common carriers engaged in interstate commerce in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence.

This Act does not lay down any express measure of damages but "the damages are such as flow from the deprivation of pecuniary benefits which the beneficiaries might have received if the deceased had not died from his injuries." (*Michigan Central v. Vreeland*, 227 U. S. 59, 57 L. Ed. at page 422.)

1.

It is apparent from the record that the verdict in this case was arrived at on the basis of adding together—aggregating—the probable annual contributions without any attempt to reduce to present values and in total disregard of the rules laid down in the Kelly and Gainey cases.

The data and table submitted to the actuary Anderson as a basis for figuring present values (Supra

p. 11) is as favorable to the plaintiff as could possibly be asked. Its accuracy and fairness have never been questioned.

Multiplying the number of years by the respective annual wage for the three periods, the total earnings of Moser for an outside expectancy of 37 years would have been $81,800.00.

Plaintiff's counsel proved by defendants actuary that the present cash value of these same earnings figured at the low rate of four per cent would be $42,416.00, *that is to say that the present value of the same earnings through a period of thirty-seven years was just a little over fifty per cent of the total of those earnings.*

A more graphic illustration could not be had of the importance of the rule laid down in the Kelly case.

This $42,416.00 is the present value of Moser's total earnings on a 37 year expectancy basis—not the present value of his contributions.

Assuming—which is manifestly not the fact—that the verdict of the jury $34,000.00 represents the present value of the contributions Moser would have made to his wife and daughter, through the years, then there was left for him to spend on himself approximately only $8,000.00; i. e., to sustain this verdict as being based on reduction to present value, the violent presumption must be indulged that in the 37 years his wife and daughter would have gotten $34,000.00 of his earnings and only $8,000.00 would have been spent by him on himself. The assumption is not

warranted; to the contrary the conclusion is inevitable that on the basis of the present value of all his earnings, that the contributions through the years as reflected by the verdict are not reduced to a present value.

The jury considered nothing but Moser's earnings. No other element of damage is mentioned by them, and the only other element of damages, the advice and counsel to the child, has no such support in the record as would justify an assessment of damages.

The amount of this verdict at eight per cent will yield $2,720.00 per year; at seven, $2,380.00; at six, $2,040.00; at five, $1,700.00; at four, $1,360.00.

The total earnings for 37 years, $81,800, would average $2,210 per year. One-half of this would be $1,105.00 and two-thirds of it would be $1,473.00.

Three of the jurors made their calculations on the basis of a $900.00 per year contribution by Moser, or one-half of an $1,800.00 income; two on the basis of $1,000.00 and one on the basis of $1,200.00. The other three did not seem to have any basis for calculation.

It will be noted from the above that the interest on this verdict at 8% is $510.00 more than the annual average of his entire actual earnings; and at 7% is $160.00 more, and at 6% is only a few hundred dollars less than his total earnings, but over $900.00 more than one-half of his earnings and about $600.00 more than two-thirds of his earnings. And at 5% the interest is approximately $600.00 more than one-

half of his average earnings, and $226.00 more than two-thirds of his average earnings, and even at 4% interest is approximately $250.00 more than one-half of his average annual earnings and only about $100.00 less than two-thirds of his average earnings.

So it is manifest that at any rate above four per cent the plaintiffs will get more interest from this judgment—considerably more—than Moser could possibly have contributed to them, and that at 4% they will get approximately as much as he would probably have contributed to them; and as to the widow, during her entire life the principal is kept intact and is available to her for disposition, and as to the child, as to whom contributions are only to be considered until she is 21, the principal continues intact and she has the whole amount available when she reaches the age of 21, to be hers forever.

It should be borne in mind that these figures are made on the basis of a 37 year expectancy when Moser's real expectancy as a brakeman was only about 31 years; and in the calculations no allowance is made for sickness, loss of time, vacations and possible decline in earning capacity with approaching age.

In other words, the calculations are made on the very outside basis—a basis that really is not justified.

Again it is manifest that the verdict in this case on the face of the record could not have been reached by reduction to present values.

From thoroughly credible sources and without any

ontradiction whatsoever, the defendant showed that noney could be safely loaned in Bell County and in ther sections of the State—with ample demand—at ight per cent, without risk and without cost to the ender, the broker furnishing for a commission paid y the borrower, the requisite skill and judgment. his testimony being undisputed, we insisted in the ourt below that we were entitled to have the eight er cent rate used.

But certainly in the light of the record considera-ion of a rate lower than six per cent was unwar-anted.

Under the testimony of Anderson, which is in no ay questioned, two-thirds of the annual earnings fig-red at eight per cent would have a present value of 17,446.00; at seven per cent, $19,439.00; and at six er cent, $21,845.00.

And we submit that this last figure, $21,845.00, gured at 6 per cent, marks the very maximum of dgment that this record will justify if the rule re-ucing to present value is applied.

And taking Anderson's figures developed by plain-ff, the same earnings, reduced to present value at ur per cent have a present value of $42,416.00, and suming that plaintiffs would have received two-irds of the earnings, the present value of what they ould receive being one-third less, would be $28,-1.00, even figured on the whole thirty-seven year riod.

And taking the cost of annuities as proved by plain-

tiff, or $18.36 for each dollar (testimony of Bassett, R. 93) and multiply this by $1473.00, two-thirds of Moser's average annual income under the table for the full thirty-seven years, gives a maximum verdict of $27,054.28 as against the $34,000.00 rendered.

So it is apparent from these figures that on the lowest bases suggested, the judgment is six to seven thousand dollars excessive, even though figured at an expectancy of thirty-seven years when thirty-one was the proper one, and without cutting it down to the period of minority or making any allowance for advancing age, sickness, etc.

At the rate of six per cent it is approximately $12,000.00, more than a reduction to present values will warrant, and at seven, about $15,000; and at eight, about $16,500.

Aside, therefore, from the testimony of the jury that no such rule was considered, the record makes it clear that the verdict was not reached by application of the rule of reduction to present value and that the verdict while guaranteeing plaintiffs every dollar of contribution that could be reasonably expected and more, will not, as required by the rule, *absorb itself*, but will *perpetuate itself* and will continue a fund that will yield the same annual rate for all time to come, being therefore, clearly in the condemnation of the Kelly case in that it affords more than compensation, being arrived at by aggregating the benefits without taking account the earning power of the money presently to be awarded.

In the cases of *L. & N. v. Trammel* (Ala.), 9 So. 870; *McAdory v. L. & N.* (Ala.), 10 So. 507; *Central Railroad v. Rouse* (Ga.), 3 S. E. 307; *A. & W. v. Newton* (Ga.), 11 S. E. 776, all cited by this Court in the Kelly case, and in the cases of *Chaffin v. N. & W.*, 93 S. E. 822; *Jones v. Kansas City Southern*, 78 So. 568; *Simmons v. L. R. & N. Co.*, 96 So. 12, citing and following the Kelly case, verdicts are analyzed under the records as we have undertaken to analyze the verdict in this case, and the verdicts condemned because of being manifestly more than present values.

In the very recent case of *Sipes v. Michigan Central* (Supreme Court of Michigan, decided June 15, 1925), 231 Mich. 404, 204 N. W. 84, the Supreme Court of Michigan says:

> "The amount awarded would yield an income, if placed at interest at 5 per cent, of $758.33 per annum, come within $3 of decedent's average yearly earnings, and at the end of 39 years the sum awarded would still be intact. In Chesapeake & Ohio R. Co. v. Gainey, 241 U. S. 495, 36 Sup. Ct. 633, 60 L. Ed. 1124, the widow had verdict for $16,000, and it was insisted that the award if placed at interest, would yield an annual income greater than the amount the widow would have received, and yet leave her the principal to dispose of at her death. It was held that such a result is not permissible."

2.

The testimony of the jurors absolutely confirms the clear deduction from the record that the rule of reduction to present value was in no way applied in this case.

The testimony of the jurors is set forth supra pp. 27-33.

They are an absolute unit on the proposition that they made no attempt to reduce to present value and had not the slightest idea under the charge that any such duty was required of them.

They are a practical unit also on the proposition that they arrived at their verdict by a very liberal aggregation—summing up—of the contributions that might be expected through the years and taking substantially that sum as their verdict without any reduction whatsoever for the earning power of the money.

We discuss below the insufficiencies of the court's charge to advise the jury of the requirement for reduction and the objections of the defendant to the charge.

But right here in connection with the testimony of the jury we ask the court's attention to the phraseology of Special Issue No. 7 and the language therein that we have italicized:

> "What amount of money, if paid now, will fairly and reasonably compensate the surviving widow and child of the deceased, John H. Moser, for the actual pecuniary loss which they re-

spectively suffered by reason of his death, if any? *This question you will answer by stating the aggregate amount of such pecuniary loss or damage, and you will answer in the space below the amount you find from the evidence.*" (R. 22.)

What the Court here tells the jury to do their testimony shows most emphatically they did. They determined and stated "the aggregate amount of such pecuniary loss or damage"; but this without any attempt to reduce to present values.

The special issue is relatively short. The general instruction on the measure of damages is relatively long.

It was perfectly natural for the jury to make more reference to the special issue, it was a short and clear-cut statement of what they were to do. And by the use of the language "stating the aggregate amount of such pecuniary loss or damage," the trial court clearly emphasized and made more positive the error as against defendant in not making his general instruction more explicit and definite.

3.

Charge of the court was not full enough to convey to the minds of the jury the important rule of the Kelly and Gainey cases—that the contributions to be expected through years must be reduced to a present value by taking into consideration the earning value of the sum presently to be awarded; the terse expression "at this time" is not sufficient to insure the

conveyance of the rule; and defendant's exceptions to the charge should have been sustained and the charge made more full.

The Kentucky court in the Kelly case declined to apply the rule of reduction to present values because it regarded a jury incapable of determining a verdict under such a rule.

This Court points out the fallacy of this position and undertakes to make clear to trial courts the rules by which the determination of a verdict in cases of this kind must be had.

And pertinent to the question in hand the following principles are laid down:

> "It is self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future."
>
> That a verdict will afford more than compensation if it be made up by aggregating the benefits without taking into consideration the earning power of the money that is presently to be awarded.
>
> That a person seeking damages must use reasonable care to lessen the damage.
>
> That at this day the putting out of money at interest is so common a matter that ordinarily it cannot be excluded from consideration in determining the present equivalent of future payments, etc.
>
> That local conditions are not to be disregarded.
>
> That the principle of limiting the recovery to compensation requires that adequate allowance

be made according to the circumstances, for the earning power of money; in short, that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made upon the basis of their present value only.

"And in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award."

To convey all of these principles to the mind of a jury unlearned in the law and unfamiliar with such matters, and thought by the Kentucky Court not capable of considering them at all, it is held by the Texas Court of Appeals in this case that it is sufficent to use in the charge to the jury the brief open sesame "at this time"; that these three words "clearly encompassed (meaning, we take it, were in themselves sufficient to convey to the mind of the jury the obligations to find, etc.), present value of future expectations."

It is asking too much of this brief expression that it be the sole medium for the conveyance of so important a rule; and the rule was too vital to defendant for it to be left uncertain as to whether the jury would clearly understand it.

The full language of the charge quoted by the Court as being sufficient, when aided by the three words quoted, is as follows:

"At such sum of money as if paid in cash at this time would be sufficient to fairly compensate the sur-

viving wife and child for such actual pecuniary loss," etc.

To a trained lawyer fresh from a reading of the Kelly and Gainey cases, the expression "at this time" *might* have been understood as an injunction to reduce to present values.

But that the words would convey the same idea to an unlearned jury who knew nothing of the Kelly or Gainey cases, is a very different matter.

This Court recognizes in the Kelly case that it may be difficult for the ordinary juryman to calculate interest on deferred payments with annual rests.

Relatively few people in the ordinary walks have occasion to make such calculations. The general run of jurors know nothing about the necessity for such calculations to say nothing of the methods.

When, therefore, a jury is told to assess such a sum "as would fairly compensate the surviving wife and child for the actual pecuniary loss" it would certainly not ordinarly occur to them that they were to reduce to present values.

And any sum they would arrive at they would naturally suppose would be paid now and if paid, of course, would be paid in cash.

And we submit that adding to the instruction the language "as if paid in cash at this time" really adds nothing to what would be conveyed to the minds of the jury, and that the instruction with these words in it no more conveyed to the minds of the jury the idea that they were obligated to reduce to present

values than if the expression had been left out and the charge had read "at such sum of money as would be sufficient to fairly compensate the surviving wife and child for such actual pecuniary loss."

It seems to us that the emphatic, controlling words of the charge with the average jury naturally and practically always sympathetic with the injured party, specially a widow and children, are, "such sum of money as * * * would be *sufficient to fairly compensate* the surviving wife and child," etc.

The testimony of the jury shows conclusively that this was the controlling language with them.

The majority of them figured out what they thought was the probable annual contribution and multiplied that by the expectancy to arrive at their verdict.

Not a single one of them attempted to reduce to present values or considered that they were under obligation so to do.

As the juror M. L. House puts it: "I just figured what it would take to support this woman and child, that is, if she had drawn from year to year out of the money that was given to her." Or, as the foreman puts it: "A sum that could be drawn out without regard to anything being put out at interest at all, which would make up what he would have been able to contribute to his family if he had lived." Or, as the juror Dubose puts it: "That it was Mrs. Moser's business after the money was paid to her to do as she pleased with it and I thought if she wanted to put it out at interest it was her business; the charge said

to give her in a lump what was to keep her up and that child, that is the way I understood it."

While differently phrased, the testimony of all of the jurors is really relatively to the same effect.

So as a matter of fact, at least, *we know* that the jury did not understand from this charge that they were to reduce to present value.

Defendant made timely objetcion to the charge on the ground that the language used was not sufficient and that the charge "should tell the jury that they will assess the plaintiff's damage at the present value of the contributions in money • • • ."

"To fix the damages at the present cash value of the contributions in money" is the expression of the charge asked in the Kelly case, and is certainly a very much clearer and more definite instruction than simply to refer to a payment "at this time."

But we asked further that the Court should explain to the jury how such present value may be determined under the evidence.

The defendant had laid before the jury in line with the suggestion of this Court in the Kelly case, accurate and well worked out data by which the present value could be determined.

This testimony was a thing of value to the defendant under a full charge by which the jury would have been advised as to their obligation with reference thereto.

But the practical ignoring of this line of proof and the absence of any instruction directly bearing upon

it was calculated to entirely nullify its effect before the jury—as the testimony of the jury shows that it did; and the presence of the testimony therefore, did not aid the charge.

The charge is further objected to on the ground that it did not give the jury a rule or formula by which it might determine the amount of money if paid now that would fairly and reasonably compensate, etc.

Under Texas practice where timely objection is made to a charge and the defect in it pointed out, it is not necessary for the saving of the error that special instructions should also be asked.

G. C. & S. F. Ry. Co. v. Conley, 113 Tex. 473.
G. C. & S. F. Ry. Co. v. Locker, 273 S. W. 831.

4.

"In all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award." (C. & O. v. Kelly); and, as we submit, is to be discounted at such safe rate.

We have quoted the language of this Court in the Kelly case in the heading above.

Defendant showed by an abundance of testimony that money could be safely earned in Bell County and all over Texas, without cost or risk to the lender at 8 per cent.

The plaintiff made no attempt to contradict this

testimony and it stands uncontradicted in the record, and under the well-settled rule that where testimony is undisputed the facts are to be taken as shown (*Grand Fraternity v. Melton*, 102 Texas at page 402; *Hines v. Pennington*, 240 S. W. at page 704; *Hall v. Ripple*, 145 S. W. at page 311), defendant felt that it was entitled to have the reduction figured on an 8% basis, and it asked a special charge to that effect which was refused.

We believe that charge was warranted under this record.

But whatever objection might be made to it, defendant was certainly entitled to have its Special Charge No. 8 (supra, p. 23) given.

It directed the jury "to make their calculations on the basis of their award bearing interest at the highest net rate of interest that the testimony shows can be had on the money safely invested and secured, as shown by the testimony in this case."

This instruction is based directly on the quotation made above from the opinion in the Kelly case.

It did not undertake to say what the rate should be. It did, however, require the jury to find a *safe rate* and to make a reduction *on the basis of that rate.*

And a safe rate being found by them there was certainly no discretion in the jury to figure out a lower rate, two, three, four, five, etc., per cent as they willed.

As applied to a court, discretion means "sound discretion guided by law and must be governed by rule,

not by humor. It must not be arbitrary, vague and fanciful" (Lord Mansfield, 4 Burrows 2539); it is to be exercised in determining the course prescribed by law; and, when it is discerned, it is the duty of the court to follow it (*Osborne v. Bank*, 9 Wheat 737), and certainly an unlearned jury has not a wider discretion.

In *Seaboard Air Line v. Tilghman*, 237 U. S. 499, 59 L. Ed. 1069, where the question was as to a proper charge on the question of reduction of damages because of contributory negligence, this Court says:

> "No reference was made to the rule of proportion specified in the statute, or to the occasion for contrasting the negligence of the employee with the total causal negligence as a means of ascertaining what proportion of the full damages should be excluded from the recovery. On the contrary, the matter of diminishing the damages was committed to the jury without naming any standard to which their action should conform other than their own conception of what was reasonable."

We submit there is no distinction in principle between a charge on the effect of contributory negligence and a charge to reduce to present values. The defendant was just as much entitled to have a standard defined by the charge in the one instance as in the other. And we submit that the charge of the court and his refusal to give our special charge is open to the condemnation of the charge in the Tilghman case.

5.

The value of the services of the wife to the husband and the child to the parent of which they were respectively relieved by the death are proper matters to be considered by the jury in reduction of the damages.

Had it been the wife who was killed instead of the husband, he would have been entitled to recover the reasonable value of the services she would have rendered him; and if it had been the child who had been killed he would have been entitled to have recovered the value of her services to him.

Very large verdicts have been rendered for these elements of damage and have been sustained.

Services cannot be rendered without a draft on the time and energy of the parties rendering. The measure of damages under the death statutes has never been considered on a sentimental basis. The question involved is only a practical determination of pecuniary values.

If the services of the wife have a value to the husband if lost to him, they certainly have a value to her if saved to her.

The particular question here raised has not been passed on by the courts that we have found, but cases involving the same principle have been ruled favorably to our contention.

It is well settled that in a suit by the husband for the death of the wife that the measure of damages would be the pecuniary value of the wife's services

less the cost of properly and suitably maintaining her. G. C. & S. F. v. Southwick, 30 S. W. 593; *Gorton v. Harmon*, 152 Michigan 472, 116 N. W. 443; Corpus Juris, Vol. 17, title "Death", Section 233.

In the *Southwick* case in the opinion it is said:

> "The court was requested to instruct the jury that in estimating the damages, if any, sustained by the plaintiff J. S. Southwick in the death of his wife, they should consider the expense of maintaining the wife, and the measure of damages would be the pecuniary value of the wife's services, less the cost of properly and suitably maintaining her. • • • The charge requested and refused should have been given, as it gave the proper rule for determining what the loss of the husband, if any, was."

In the *Harmon* case, 152 Michigan, the Supreme Court of Michigan, 116 N. W. at page 445, says:

> "The court instructed the jury that the measure of damages was the value of the services lost to the plaintiff, and that they should not deduct the cost of her maintenance. It is the well-settled rule under this and similar statutes that compensation is limited to the pecuniary loss sustained. • • • Counsel for plaintiff cite several cases and text-book authorities holding that a husband is entitled to recover the reasonable value of the time and services lost to him, but none of them discuss the question now before us. It is as much the duty of the husband to provide suitable clothing and maintenance for his wife as it is for his son. He is entitled to the value of the services of both. It is the universal rule that

> in case of a son or daughter the cost of maintenance must be deducted from the value of his services. Snider v. Lake Shore, etc., Ry. Co., 131 Mich. 418, 91 N. W. 643; McDonald v. Champion Iron & Steel Co., 140 Mich. 401, 103 N. W. 829. There can be no distinction between the case of a son and that of a wife. The pecuniary loss in each case is the value of the services less the cost of maintenance. See Gulf, etc., R. Co. v. Southwick (Tex. Civ. App.), 30 S. W. 592; Railway Co. v. Gunning, 33 Colo. 280, 80 Pac. 727; 13 Cyc. 370. It follows that the instruction of the court in this regard was erroneous."

The reason the cost of maintenance should be deducted is of course because *more than compensation* would be awarded if the full value of the services of the wife or child were allowed without such deduction.

The Court of Appeals disposes of our contention in this connection by saying:

> "Under appellant's proposition, if Mrs. Moser had herself been earning an income, and would probably have contributed services to him equal in value to his probable and expected services to her, she would have been entitled to recover nothing for his death. Or, as a reductio ad absurdum, if, as might be true in some instances, the pecuniary value of the services to be rendered the husband by the wife, should exceed the pecuniary value of the services to be rendered the wife by the husband, and the Railway Company should negligently kill the husband, under appellant's theory she would be indebted to the Company for his death."

We see nothing extreme or absurd about the result eached by the application of the rule contended for y us even as stated by the Court of Appeals; with e exception, of course, of the suggestion that the usband or wife might become indebted to the Rail- ay Company—this feature needs no answer.

If a wife's earnings are greater than her husband's nd if there be any contribution from one to the other, is by the wife to the husband and not the husband the wife, certainly she sustains no pecuniary ss by his death and an award of damages to her uld only be by way of solatium, which is not per- issible.

It is certainly the law in these cases that if there not in fact a pecuniary loss, there can be no re- very.

And that the wife's contribution may be in service stead of money makes no difference. If they run a ore together and she does all the work and he takes t all the profit, she is certainly not a loser by his ath.

That the services she may render are household rvices makes no difference in principle. The differ- ce, if any, is in degree and not in kind. That the aft on her time and energy if she still performs the usehold services for her child may not be greatly duced does not affect the principle. How much the duction should be, is for the jury under all the facts d circumstances.

If the position of the Texas Court of Appeals is cor-

rect, then the holdings in the Southwick and Gorton v. Harmon cases, supra, are wrong, because the cost of a wife's maintenance—as is unfortunately too often the case—may exceed the value of such services as she renders and therefore if the rule of the Texas Court was followed, the husband could recover nevertheless.

As pecuniary compensation is all that is to be awarded under the death statutes, a defendant is certainly entitled to have the jury consider in mitigation of damages the value of any benefit or relief that comes to the beneficiaries by reason of the death.

6.

The jury should have been instructed to take into consideration the probability of Mrs. Moser's marrying again.

Mrs. Moser was just 27 (R. p. 79).

So far as we have found, this question is an open one in the Federal Courts.

In the case of *Sipes v. Michigan Central*, 231 Mich. 404; 204 N. W. 84, decided in June, 1925, the Supreme Court of Michigan says:

> "The widow was 21 years of age at the time of the trial, and defendant requested the court to instruct the jury to consider, in fixing the period of loss of support, the possibility of her remarriage. This was covered by the tenth request, and was not given, nor the substance thereof included in the charge. The possibility

of so young a person contracting another marriage should have been permitted to temper the thought of celibacy for 39 years. Jones v. McMilian, 129 Mich. 86, 88 N. W. 206."

In the case of *Dinnihan v. Beach Imp. Co.*, 40 N. Y. Supp. 764, the suit was for the death of a 16 year old girl whose father was a laboring man, his wife being dead and the daughter keeping house for him, the action being brought for the sole benefit of the father, and in the case Judge Follett, discussing the amount of the verdict and reaching the conclusion that same is excessive, says:

> "The fact that she might have married, or died, and left her father's service on becoming of age, are possibilities which should be taken into account in determining his pecuniary loss."

In the case of *Collins v. City of St. John*, Supreme Court of New Brunswick, 38 New Brunswick 86, at page 95 it seems to be clearly recognized that the probability of parties marrying again under these circumstances is one properly to be considered. Discussing the question of amount of damages the Court says:

> "Of course it may be said that the plaintiff, without any family, need not and in fact does not keep house, or that six years is an unreasonably long period to fix as the life of one so seriously affected by heart trouble, or it may be said that a much more likely thing will happen that the plaintiff will remarry and his domestic *status quo* be restored, and, therefore, $900 is too large

> a sum. The jury is, however, the judge of these things, and we must assume that these considerations were present to their minds when they fixed upon $900 as the damage."

We are well aware that perhaps the weight of authority is against our position, but we earnestly submit that the weight of reason is for it.

The law undertakes only to compensate and the probability of parties who have lost a spouse remarrying is always present—always very possible—and that the view expressed by the Michigan, New York and New Brunswick courts is, we submit, the sound position.

7.

There being nothing to show that deceased had any qualifications that would render any advice or training by him a matter of pecuniary value; or of such character as could only be supplied by another for compensation; or that any training, advice or nurture he might furnish had any pecuniary value, such elements should not have been submitted to the jury, but they should have been instructed to disregard the same.

In *Michigan Central v. Vreeland*, 227 U. S. 59, this Court says:

> "A minor child sustains a loss from the death of a parent, and particularly of a mother, altogether different from that of a wife or husband from the death of the spouse. The loss

of society and companionship, and of the acts of kindness which originate in the relation and are not in the nature of services, are not capable of being measured by any material standard. But the duty of the mother to minor children is that of nurture, and of intellectual, moral, and physical training, such as, when obtained from others, must be for financial compensation.

"In such a case it has been held that the deprivation is such as to admit of definite valuation, *if there be evidence of the fitness of the parent*, and that the child has been actually deprived of such advantages."

And recognizing that a surviving wife might be entitled under certain conditions to compensation for services that the husband might be in the habit of rendering to her, this Court says:

"But there was neither allegation nor evidence of such loss of service, care, or advice; and yet, by the instruction given, the jury were left to conjecture and speculation. They were told to estimate the financial value of such 'care and advice from their own experiences as men.' These experiences, which were to be the standard, would, of course, be as various as their tastes, habits, and opinions. It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband."

The charge in this case does not tell the jury in express words that they may estimate the financial value of such "care and advice from their own experiences as men," but the effect is the same because

there was no evidence of the character of care or advice the deceased was capable of or would have rendered, and of necessity they must, to have considered the issue at all, have done so from the standpoint of their experiences as men.

And in *American Railway Co. v. Didricksen*, 227 U. S. 145, 57 L. Ed. 456:

> "There was no allegation for any such loss, nor any evidence relating to the subject, or from which its pecuniary value might have been estimated. The scope of the compensation recoverable under this statute has been so fully considered in Michigan C. R. Co. v. Vreeland, decided January 20, 1913 (227 U. S. 59, ante, 417, 33 Sup. Ct. Rep. 192), that we need not say more."

In *Griffey v. Pacific Electric Company*, 209 Pacific 50, the Supreme Court of California considers at length the question of whether a father may, in an action for the death of his grown daughter, recover on account of loss of society and comfort and specially as those terms might involve the loss of advice and counsel, etc., and concludes that those elements could not be considered without proof of the daughter's *special qualification to render service in that connection and its value.*

And in *Sipes v. Michigan Central*, decided June 15, 1925, 204 N. W. 84, the Supreme Court of Michigan, while recognizing that the pecuniary loss of an infant might include the expense of supplying such degree of nurture and moral and physical training "*as the*

evidence shows such parent was, by reason of ability, character and temperament, capable of giving," says:

> "Mere parentage does not carry such a showing.
>
> "Evidence relating to the nurture bestowed, and revealing the intellectual powers and moral character of the person, is available, and must be introduced to show the extent of what would have been supplied by the deceased had he lived, and, by reason of his death, need now be bought and paid for.
>
> "To measure what has been lost, it is necessary to consider the capacity of the parent to bestow. Without such light, the jury would *have to apply their own standards, based on their individual experiences and these would, of necessity, 'be as various as their tastes, habits and opinions.'* See Michigan C. R. Co. v. Vreeland, 227 U. S. 59, 33 S. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C 176."
>
> "And the result would therefore be reached without considering the parent at all.
>
> "The evidence falls short on this subject and there was error in permitting the jury to assess damages for such a loss."

The evidence here clearly falls short of any showing by which the jury could measure what had been lost and any award they would make must rest solely upon mere parentage.

Proof such as was made in this case could be made in nearly any case. Nearly all men in this country of about Moser's age have been through high school and the great majority of American fathers, specially

those of the middle class, are devoted to their children and like to be with them, specially their first born and when they are small.

Paraphrasing the Supreme Court of Michigan, if the jury can allow damages for nurture and advice under the evidence in this case, they are warranted in doing so in any case. The individual parent is not involved at all, for all that the evidence shows is that he has the common attributes of all fathers; love and affection for his child and a common school education. The love and affection will be lost to his child, but these are not recoverable for.

That he was capable of giving advice of value is not shown at all.

This reasoning applies specially to the loss by a minor daughter of her father.

As a rule, mothers rear children, not fathers, and this is specially true with reference to the girls in a family.

And we submit that it is a far call to permit the average jury to take as the basis for the swelling of damages in death cases the vague, general question of the possible, speculative value of advice and training that men in the ordinary avocations of life and with no special aptitude to give advice or to train might give a minor daughter.

8.

Such matters not being covered by the charge of the court, defendant was entitled to have given its

special charges directing consideration in connection with the question of damages, of the probable effect on deceased's earnings of a return to normal conditions after the abnormal conditions of the war and of the effect of advancing age, possible sickness, etc., and the hazardous nature of his employment, etc., and the probable effect of these matters on his earning capacity.

The undisputed testimony was in keeping with common knowledge, to-wit: that wages went to absolutely abnormal limits during the war. There had been one decrease before Moser's death from this abnormal wage rate. That further reduction would come with the return to more normal conditions was among the probabilities and defendant was entitled to have the jury consider such probable reduction of wages as might be expected to follow.

In *Burns v. Railroad*, 68 Atl. 704, the Court condemned an instruction by the trial court because of its "disregarding the important fact that his earning powers were necessarily diminished as he advanced in years."

In *Glasgo v. Green* (Pa.), 117 Atl. 79, it is said:

> "Furthermore, earning capacity extending over a long term of years should be considered as in average rather than war times (Burns v. Pennsylvania R. R. Co., supra), and the decreasing capacity, with advancing years, should also be considered."

It is the testimony of the actuary Anderson and is a matter of common knowledge that the calling of deceased, that is railroad brakeman, was extra hazardous. The very hazard of the calling is one of the elements that have made for the high rate of wages paid. It is incident to the nature of the calling and not necessarily traceable to negligence. The calling made a difference of over five years in the expectancy as figured by the Insurance Companies.

In *Jones v. Kansas City Southern Railway*, 78 Southern at page 571, the Supreme Court of Louisiana says:

> "The evidence shows that the life expectancy of a locomotive engineer, because of his hazardous occupation, is taken 8 years beyond his age. Accordingly a locomotive engineer 56 years of age is rated at 64. That rule has been adopted by the life insurance experts, and there is no reason why we should not avail ourselves of their knowledge and experience. In fact, we have this strong equitable reason for considering the danger of the occupation: That it is presumed that the employe was compensated for the risk, in the wages he received, and that the beneficiaries will therefore have the compensating advantage of a higher rate of future benefits, in our calculation, than they would have if the risk had been an ordinary one."

In the case of *Simmons v. L. R. & N. Co.*, 96 Southern 12, it is stated that the trial court in computing damages in an action under the Federal Employer's Liability Act, deceased being employed as the fore-

man of a construction gang, applied the formula given in the Jones case (supra), which formula was one for reducing annual contributions to a present value, "except that he declined to make allowance for the hazardous occupation of deceased in figuring on his life expectancy." In this conclusion the Supreme Court of Louisiana refused to concur and adverting to the rating that insurance companies give to the hazardous occupation says:

> "The reason why the insurance companies charge a higher rate on the life of a man of hazardous occupation than on the life of a man of nonhazardous occupation, of the same age, is that the man of hazardous occupation has a greater chance of being killed, and has the same chance that any other man has of suffering any other of the ills that flesh is heir to. In other words, according to the theory of chances, a larger proportion of men of hazardous occupations than men of nonhazardous occupations, of the same age, die every year."

And the court concludes that the hazardous character of the occupation should have been considered.

Certainly the defendant was entitled to have the jury instructed as to every rule applicable to the facts for the reduction of damages which a court is required to enforce.

In the early Georgia case of *Central Railroad v. Rouse*, 3 S. E. 307, Chief Justice Bleckley stated the rule for the measure of damages in a death case as follows:

> "The measure of damages, in an action by a wife for the homicide of her husband, since the passage of the act of 1878 (Code, 2971), is not affected by the wants of the family, but depends solely on the value of the husband's life. In estimating such value by age, habits, health, occupation, expectation of life, ability to labor, and to furnish care and attention to the family, probable increase or diminution of that ability, with lapse of time, rate of wages, etc., the necessary personal expenses of the husband should be deducted, and the balance, reduced to its present value, would be the value of the life."

This comprehensive statement of the rule is in line with practically all of the authorities and it is certainly in line with the decisions of this court.

And as the age, health, occupation (which necessarily involves its nature and character and the dangers incident thereto), ability to labor and "probable increase or diminution of that ability, with lapse of time," are proper matters to be considered, certainly the defendant is entitled to have the jury instructed in regard thereto.

The judgment of the Court of Civil Appeals should be reversed and the cause remanded.

Respectfully submitted,

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